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NO. 85-814
in the
SUPREME COURT
OF THE
UNITED STATES
October Term, 1985

ALAN C. KAPLUS,

Petitioner,

vs.

GENE E. PHILLIPS, WILLIAM S. FRIEDMAN, SYNTEK OF FLORIDA, INC.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

DID A UNANIMOUS PANEL OF THE ELEVENTH CIRCUIT VIOLATE THE SEVENTH AMENDMENT BY HOLDING THAT A SUIT SEEKING RESCISSION OF THE SALE OF A PARTNERSHIP INTEREST, ALONG WITH A RIGHT TO AN ACCOUNTING BY A PARTNER AND THE IMPOSITION OF A CONSTRUCTIVE TRUST AND LIEN, WAS COGNIZABLE IN EQUITY?

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COUNTER-STATEMENT OF THE CASE

In an attempt to seize this Court's attention in this factbound business dispute, Petitioner, Alan C. Kaplus,[1/] characterizes the Eleventh Circuit's opinion as one directly raising an issue of whether the complexity of a lawsuit justifies denial of a jury trial. This characterization is devoid of any basis in the opinion below or elsewhere in the record. Petitioner also criticizes the Eleventh Circuit for not following dicta in a Third Circuit opinion, but then admits that the Eleventh Circuit's decision on the only issue presented here followed the Supreme Court's Seventh

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1/ Although the Petition's printed cover says "PETITION FOR WRIT OF CERTIORARI," the contents contain no petitioning language or even a reference to certiorari. The "PETITION" does not purport to include the Johnson Collection, Inc., Petitioner's co-defendant in the District Court and co-appellant before the Eleventh Circuit.

Amendment teachings in Ross v. Bernhard, 396 U.S. 531 (1970). Petition at 8-9. Petitioner's real complaint with the decision below can be seen when he states:

> "Reading the thirty page opinion of the trial court, no one can say that the result was unjust. But, it is based upon sharply contested findings of fact."

Petition at 3.

The petition falls far short of presenting a "special and important reason" for granting certiorari, as required by Supreme Court Rule 17. The Court should deny Petitioner's attempt to create a cert-worthy issue of Petitioner's fact-specific disappointment.

At the time this case was set for trial, Respondents, plaintiffs below,

sought only a rescission of their sale to Petitioner of Respondents' interests in a real estate partnership, plus a post-rescission accounting and the establishment of a constructive trust, and imposition of a lien upon Petitioner's and his co-defendant's interests in the partnership. Petition Appendix at 8-9. Although Respondent had initially sought money damages, that claim was dropped well before trial. Petition Appendix at 8-9.2/

Petitioner, albeit imperfectly, requested a jury trial, but the District Court ruled that the claims remaining in this suit were equitable in nature, to be tried before the court without a jury. At the ensuing bench trial the District Court found that Petitioner and his co-

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2/ Respondent at first asserted counterclaims for money damages but dismissed them all, and did not appeal any issues arising out of these claims.

defendant had defrauded Respondents into selling Respondents' interests in the partnership to Petitioner and his co-defendant. Pertinent excerpts of the District Court's findings of fact are attached as Respondent's Appendix. ("Resp. App.") As part of its holding the District Court found against Petitioner on all issues relating to credibility and veracity. Resp. App. at A10. The District Court granted a rescission of Respondents' sale to Petitioner and his co-defendant, recognized a constructive trust, impressed a lien upon Petitioner's interest in the partnership, and held that Respondents were entitled to a future accounting in order to trace funds and to restore the partnership's accounts to the status before the fraud. Petition Appendix at 8. The District Court has

not yet undertaken an accounting and has not as yet held that Respondents are entitled to any specific funds.

In order to protect Respondents and to protect the integrity of the court's order from possible diversion of funds, the District Court ordered all funds generated from the partnership's property to be placed into the court's registry. This money has remained in the registry because the District Court has retained jurisdiction over the accounting, which has not yet taken place. Contrary to Petitioner's contention [Petition at 3], at no time has any court held that any of the parties is entitled to money. Whether the respective parties will be entitled to share in the partnership funds, and the amounts to be shared, must await the accounting.

The unanimous panel of the Eleventh Circuit, per Judge John R. Brown, specially sitting, affirmed the District Court's denial of a jury trial.[3/] The Circuit Court noted that before trial Respondents had dropped their claims for damages and "[t]he essence of [Respondents'] complaint below was a request to rescind the transfer of their partnership interest to [Petitioner], and to restore the parties to their positions as joint venturers as they existed before the fraudulent transfer took place." Petition Appendix at 12. The Eleventh Circuit held that rescission of the sale of the partnership interest was properly tried without a jury. The court then

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3/ The Circuit Court reversed the District Court's holding that the transactions in question involved a security. Although this decision had the effect of denying attorney's fees to Respondents under the Florida Securities Law, Respondent have elected not to file a cross-petition on this issue.

relied upon historical precedent and the Supreme Court's three-part test in Ross v. Bernhard to hold that the right to an accounting is equitable in nature, to be tried before the Chancellor.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit Did Not Deviate From This Court's Seventh Amendment Teachings in Ross v. Bernhard and Dairy Queen v. Wood

The Seventh Amendment preserves to litigants the right to jury trial in suits at common law, "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . ." Parsons v. Bedford, Breedlove & Robeson, 3 Pet. (U.S.) 433, 447 (1830). After the merger of law and equity in the federal system in 1938, the determination of the precise legal or equitable nature of a cause of action was rendered more difficult.

The Supreme Court's most recent teaching on this issue is found in the

three-part test of Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970):

> [T]he "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries."

The Eleventh Circuit considered these three criteria correctly.

The Eleventh Circuit properly addressed the first criterion of Ross, stating that, before the merger of law and equity, suits seeking rescission of sales of partnership agreements, with rights to an accounting and imposition of a constructive trust, were creatures of the Chancellor. Pre-merger custom dictated that Equity would determine the relationships and duties of partners to each other, and the winding up of partnership affairs after a fraud. E.g.,

Mathewson v. Clarke, 6 How. (U.S.) 122 (1847); Ambler v. Whipple, 20 Wall. (U.S.) 546 (1874); Simonton v. Sibley, 122 U.S. 220 (1887)(bill in chancery for settlement of accounts of partnership). As Chief Justice Fuller stated in Oteri v. Scalzo, 145 U.S. 578, 593 (1892):

> "Undoubtedly equity has jurisdiction where . . . there may be such fraud, misconduct, and breach of duty in the conduct [of the partnership's] affairs from the inception, as to justify, upon dissolution, as between the parties, the restoration of his capital to the injured partner."

Further, it is clear that the Eleventh Circuit properly assessed the second criterion under Ross, giving due consideration to the remedy sought. Unlike the petitioners in Dairy Queen v. Wood, 369 U.S. 469 (1962), who sought money judgments on a contractual debt but

denominated such claims as equitable, Respondents at time of trial sought only true equitable remedies.

There can be no doubt that the remedies sought by Respondents at trial (rescission, accounting, and a constructive trust and lien) are historically equitable. In both federal and Florida courts, such suits remain equitable in nature.[4/] E.g., Friedman v. Golden Arrow Films, Inc., 442 F.2d 1099 (2d Cir. 1971); Luff v. Luff, 158 F.Supp. 311 (D.D.C. 1958), aff'd in part and rev'd in part, 267 F.2d 643 (D.C. Cir. 1959); Schaefer v. Gunzberg, 246 F.2d 11 (9th Cir.), cert. denied, 355 U.S. 831

4/ As the Eleventh Circuit's opinion noted, the right to a jury trial in federal court is a federal question. Simler v. Conner, 372 U.S. 221 (1963). Florida law is, of course, relevant because the District Court's jurisdiction over the equity issues, by virtue of the Eleventh Circuit's decision, was based on diversity of citizenship.

(1957); Padgett v. First Federal Savings & Loan Assn., 378 So.2d 58 (Fla. 1st DCA 1979); Riggs v. Saltmarsh, Cleaveland & Grund, 341 So.2d 818 (Fla. 1st DCA 1977).

The inadequacy of Respondents' remedies at law was clearly established in the preliminary proceedings before the District Court. The Eleventh Circuit correctly affirmed these findings when it held that the remedies sought by respondent were equitable.

Finally, the Eleventh Circuit gave proper consideration to the third Ross factor, which addresses "the practical abilities and limitations of juries." Ross, 396 U.S. at 538 n.11. The Circuit Court noted that the complexity of actions for an accounting supports Equity's jurisdiction over such suits, and the claims and remedies involved in this case were complex, thus supporting

equitable jurisdiction. Id. at 538. The court surveyed cases from the Supreme Court and other Circuits and declined to follow the suggestion found in language from a Third Circuit opinion that mere complexity of facts alone might provide the basis for the denial of a jury trial in federal court.

The Eleventh Circuit's decision in this regard follows the letter and spirit of Ross. Under Ross' tripartite test for determining the legal or equitable nature of an issue, 396 U.S. at 538 n.10, other factors besides complexity bear on the decision to grant or deny a jury trial.

That the Eleventh Circuit considered all of the Ross criteria also reflected the true nature of this case. This case involved simple remedial steps taken to restore and wind up a partnership victimized by fraud. Although somewhat

complex, this case did not entail the myriad documents, proof, and witnesses, or conceptually difficult scientific or legal issues which might convince a court to deny a jury trial because of complexity alone. Thus the Eleventh Circuit's consideration of all three Ross factors was required by the facts of this case as well as by Ross itself.

Petitioner asks this Court to review the question of whether the complexity of the case alone is sufficient to deny a jury trial. The District Court did not on such grounds deny, nor did the Eleventh Circuit on such grounds affirm denial, of a jury trial. Petitioner seeks this Court's review of an issue upon which neither court below based its holding. The issue of complexity was in no way involved in the case other than in a passing reference to Ross.

II. There Is No Conflict With The Third Circuit

Petitioner attempts to show that the Eleventh Circuit's Seventh Amendment holding conflicts with language found In Re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). Even a cursory reading of the Third Circuit's opinion belies Petitioner's contention. These two cases are not remotely similar.

Japanese Electronic Products was a gargantuan antitrust and antidumping suit against over 100 world-wide co-conspirators which "after nine years ha[d] produced millions of documents and over 100,000 pages of depositions." Id., 631 F.2d at 1072-1074. Respondents' suit, however, involved one partnership which owned two plots of land; one of these plots (upon which reconstruction

had commenced) had low-rise buildings on it, and the other was a trailer park. Plaintiffs in Japanese Electronic Products sought treble damages for statutory antitrust and antidumping violations, which are compensatory and punitive remedies, plainly legal in nature. 631 F.2d at 1079. In contrast, Respondents merely requested Equity to restore them to their status as partners before Petitioner's fraud.

The facts of Japanese Electronic Products show that the defendants there appealed an interlocutory order of the District Court which had granted the plaintiffs a jury trial. On appeal, the defendants claimed that the case was too complex for a jury and argued that the District Court had ignored the third element of the Ross test. The Third Circuit vacated the District Court's

ruling, primarily on Fifth Amendment Due Process grounds. The Third Circuit held that "in suits at law, a court should deny [a] jury trial on due process grounds only in exceptional cases, [if the court] determines that a jury would be unable to understand the case. . . ." Id. The Third Circuit did not deal with suits in equity.

The Third Circuit, moreover, expressly rejected the defendants' attempt to analogize the antitrust/antidumping action at law to a suit for rescission or accounting before a Chancellor. 631 F.2d at 1080-1081. The Third Circuit itself thereby has refuted Petitioner's claim that these two suits are somehow similar. Id.

Additionally, the very holdings of the Eleventh and Third Circuits do not permit comparison between the two cases. The

Eleventh Circuit made the unremarkable holding that the Seventh Amendment did not entitle Petitioner to a jury trial in a proper suit in equity. In contrast, the Third Circuit held that in some extremely complex cases at law the Due Process Clause might override the right to a jury trial. The Third Circuit made no final determination on this Due Process issue, however, but remanded the case for the District Court to determine the jury trial issue within the Third Circuit's new Due Process framework.

Petitioner is certainly correct in his contention [Petition at 9] that the reasoning and scope of the two cases differ. The differences in "reasoning", "language" or "scope" are no grounds for the grant of certiorari in the United States Supreme Court. The only case Petitioner cites that has legal issues

similar to the case at bar is Ross v. Bernhard. Petitioner admits, however, that the Eleventh Circuit followed Ross. Petition at 8-9.

III. PETITIONER HAS NOT PRESERVED ANY FIFTH AMENDMENT JURY TRIAL ISSUES

Petitioner criticizes the Eleventh Circuit obliquely for not applying a "Fifth Amendment test" to a right to jury trial. [Petition at 9], and in a string of rhetorical questions suggests that this Court should review such an issue. Petition at 10. This issue appears for the first time in this lawsuit in the Petition for Certiorari. It was never raised below in any form, nor was it considered by either Court below. It must be deemed waived. In any event, it has no merit.

CONCLUSION

Chief Justice Hughes stated, "I think it safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made." Letter to Sen. Wheeler, 81 Cong. Rec 2814-2815 (1937). This Petition falls squarely within Chief Justice Hughes' description.

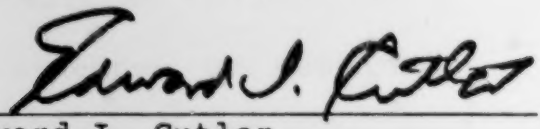
The Petition starts by presenting a question for review which was not the basis of the holding below or even directly involved in it. The Petition ends by postulating Due Process issues which Petitioner has raised for the first time, ever, on certiorari. The middle of the Petition is equally without merit. It suggests a conflict with language in a Third Circuit opinion, even though that

case is utterly dissimilar on the facts and only tangentially similar on the law.

Petitioner is understandably disappointed that his fraud upon his partners was rendered naught by the Chancellor. His disappointment, however, does create proper grounds for certiorari in a case were there are none.

WHEREFORE, this Petition should be denied.

Respectfully submitted,



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APPENDIX - SELECTED UNCONTROVERTED RELEVANT FINDINGS OF FACT

7. For a year or more prior to July 1, 1980, Kaplus endeavored to interest a prospective joint venturer or venturers to put together with him a project for the acquisition and development of two blocks of land located at Biscayne Boulevard and 120th Street in Miami, Florida. One block, intended for Phase I, was then improved only be some low-rise, aging structures. The other block, for Phase II, was improved by an operating trailer park. Kaplus did shortly before July 1, 1980, reach an oral agreement with Phillips, who was acting on behalf of himself and other other plaintiffs, to proceed with the project as joint venturers under the name Biscayne Centre Associates. [N.T. 37 et seq., 270 et seq., 601 et seq.] (R. 1179)

8. Kaplus, as a joint venturer with plaintiffs, thereupon occupied a fiduciary relationship to plaintiffs [Stip. 8]. (R. 1179)

11. Defendant The Johnson Collection, Inc., was incorporated by Larry M. Cole, a New Jersey lawyer and friend of Kaplus, on January 9, 1981 [Stip. 5(e)]. It became Cole's shell or shelf corporation [P-110, pp. 44-45]. At the time it had no relation to Biscayne Centre [P-110, pp. 44-45]. (R. 1180)

30. On or about February 9, 1981, Kaplus told Phillips he had the possibility of negotiating a 60,000 square foot lease with Storer Broadcasting Company [Stip. 5(b)], writing a letter to Storer Broadcasting Company, with a copy to Phillips [P-26]. (R. 1183)

31. Negotiations with Storer Broadcasting Company continued actively [P-70; P-11; N.T. 590]. (R. 1183)

32. On March 17, 1981, Kaplus... met with top officers of Storer Broadcasting Company and reached what was believed to be an agreement in principle for an ultimate purchase by Storer of the Phase I building, with a leaseback of lower floors of the building. Kaplus promised to prepare a letter or letters of intent....

37. Kaplus presented to Terry Lee of Storer at a meeting on March 30, 1981, a detailed proposal for a lease with option to purchase, a management agreement for an entity owned by Kaplus, and a permanent loan commitment to be furnished by Storer, including a statement that Storer has expressed an interest in funding a construction loan [P-12].

38. The foregoing developments between March 17, 1981 and March 30, 1981 were not disclosed to plaintiffs [N.T. 150-151, 312-313, P-107, pp. 31-32; P-108, pp. 141-142]. Kaplus never told plaintiffs about Storer's interest in providing financing [P-108, pp. 141-142]. (R. 1185)

41. Kaplus during the end of March 1981 and early April discussed with Marvin Rosen of Sunset Commercial Bank the matter of funds to buy out plaintiffs [P-108, pp. 122, 125, 135, 137, 139-140, 148-150]. (R. 1185)

43. Instead of informing plaintiffs of his current prospects with Storer and for financing, Kaplus during latter March and early April of 1981, told Phillips that the prospects of signing up sufficient tenants to meet lender rent-up requirements within the time specified in

the pending loan commitments were dim, that he was pessimistic about Storer [N.T. 397], that the lender would be unwilling or unable to give an extension [N.T. 307-308]. At the same time Kaplus advised Phillips that he had located prospective investors, including prospects through a contact in New Jersey, who might be willing to buy the entire project [N.T. 315-316]. (R. 1186)

45. Kaplus later told Phillips that his prospective purchasers wanted him, Kaplus, to remain in and to manage the venture, but they might be willing to purchase plaintiffs' interest in the venture at a relatively small profit to plaintiffs, leaving Kaplus with his small minority interest in the venture.

47. Without disclosing to plaintiffs that he was doing so, Kaplus negotiated with the Sunset Commercial Bank to borrow

enough cash in the name of Biscayne Centre Associates to make the cash down payment on a purchase of plaintiffs' interest in the venture, representing to the bank that he would be the purchaser.

50. A closing session for the sale transaction of plaintiffs' interest in the venture, presumably to Kaplus' prospects, took place in the New York.... Larry Cole and Kaplus were present, along with Phillips, Friedman and Stephen Levy, a lawyer in Friedman's office [Stip. 5(k)]. Phillips agreed that Kaplus would share in the proceeds of sale, and they agreed upon an allocation of the proceeds of sale [N.T. 328]. At the closing session, Kaplus objected to the plaintiffs' taking back a mortgage on the property to secure the deferred portion of the purchase price. He said that, since he was leaving his "profit" in the

deal, if the plaintiffs foreclosed the mortgage, the plaintiffs should give him back his partnership interest. Based on what he had told the plaintiffs about the purchaser's motivation, he obtained from plaintiffs a letter agreement dated April 23, 1981 [P-101], that the plaintiffs would take him back as a partner if the plaintiffs became the sole owner of the property as a result of foreclosing the purchase money mortgage received from The Johnson Collection, Inc. [Stip. 5(1); N.T. 334]. Plaintiffs were never informed that Kaplus was to be a stockholder in The Johnson Collection, Inc... On the contrary, Kaplus at and prior to the closing told Phillips he did not knew [sic] the identity of the purchasers...

51. On April 23, 1981, in New York the parties executed an AGREEMENT for the

sale by plaintiffs purportedly to The Johnson Collection, Inc., of plaintiffs' interest i n the Joint Venture, dated as of April 1, 1981 [P-2]. The agreement was held in escrow and not to be delivered until April 27, 1981 [Stip. 5(i)]. (R. 1188)

58. Plaintiffs did not then know or have reason to know of the foregoing undisclosed facts, but, if plaintiffs had then known of any of those facts, they would not have executed and delivered the AGREEMENT and would not have closed the consummated the sale of their interest in the Joint Venture to The Johnson Collection, Inc.

59. Under date of July 2, 1981, Kaplus, signing individually and as president of The Johnson Collection, Inc., executed a fictitious name affidavit [P-14] and a Partnership

Agreement for Biscayne Centre Associates, listing his share as 95% and The Johnson Collection, Inc.'s as 5% [part of P-78]. (R. 1191)

60. On and before July 10, 1981, Kaplus, through his tax counsel, took the position [P-13] with Larry M. Cole, who had formed The Johnson Collection, Inc., that Cole for a fee had acted as a nominee through the corporation for Kaplus to acquire plaintiffs' 75% interest in the Joint Venture and stated, as did Cole, that:

> ". . . this nominee relationship was necessary in order to avoid disclosing Mr. Kaplus' identity to the selling Joint Venturer, as such disclosure would have prevented Mr. Kaplus' acquisition of the entire project."

62. At and prior to July 24, 1981, when plaintiffs accepted the balance due under the purchase money note and

mortgage dated April 1, 1982, they did not know or have reason to know the true facts with regard to Storer Broadcasting Company's interest and the likelihood in April of 1981 of a favorable transaction with Storer or of the extent of Kaplus' ownership of stock in The Johnson Collection, Inc. (R. 1192)

87. Credibility issues exist by reason of conflicts in the testimony of plaintiffs Gene E. Phillips and William S. Friedman on the one hand, and defendant Alan C. Kaplus on the other. After carefully considering the demeanor and conduct of the witnesses, the credibility of their testimony. . . this Court finds and gives greater weight and credibility to the testimony of plaintiffs Gene E. Phillips and William S. Friedman than to the testimony of defendant Alan C. Kaplus. . . Credibility

issues were likewise raised and apparent with regard to the testimony of other witnesses for the defendants and in this regard, the Court resolves such issues favorably to the plaintiffs by reason of the individual and several Findings of Fact herein.